

NO. 42901-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

DOANH NGUYEN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Frank E. Cuthbertson, Judge

BRIEF OF APPELLANT

JENNIFER J. SWEIGERT
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. ASSIGNMENTS OF ERROR

1. Appellant was denied a fair trial when the court admitted exhibit 11, in which a witness stated she believed appellant was responsible for the crime.

2. Appellant was denied his right to effective assistance of counsel when his attorney failed to object to improper opinion evidence.

Issues Pertaining to Assignments of Error

1. Opinion testimony on guilt invades the province of the jury and violates the constitutional right to a jury trial. The court admitted the State's exhibit 11, an affidavit of fraud in which the owner of the bank account declared she had not written the checks at issue and she believed appellant was responsible. Was appellant's right to a fair trial violated by this improper opinion on guilt?

2. Counsel is ineffective when there is deficient performance and a reasonable probability the error affected the outcome. Was appellant prejudiced by his attorney's failure to object to the out-of-court statement expressing an opinion that appellant was guilty?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Pierce County prosecutor charged appellant Doanh Nguyen with one count of identity theft, five counts of forgery, four counts of first-degree

theft and one count of second-degree theft. CP 18-23. The prosecutor also alleged Nguyen used a position of trust to facilitate the offenses and the victims were particularly vulnerable. Id. The jury found Nguyen guilty on all counts and answered yes to both special verdicts. CP 65-86. Finding Nguyen truly remorseful, the court rejected the State's proposed exceptional sentence and imposed concurrent standard range sentences. CP 123; 2RP 16.

2. Substantive Facts

Overcome with worry for his wife, who was ill in Vietnam, and not daring to ask his employers for yet another loan, Nguyen admitted he was wrong when he removed their checkbook from a drawer and wrote himself two checks. 1RP¹ 188-89, 211. The first, for \$5,700, he cashed. 1RP 188-89. The second, for \$9,300, he merely deposited, hoping to withdraw it once he had returned to his wife in Vietnam. 1RP 188-89. However, once there, he was not able to withdraw the money and did not receive any of the \$9,300. 1RP 189, 254-55. Additionally, due to his and his parents' ties to the United States (Nguyen's parents were taken prisoner by the Viet Cong and never heard from again), he was unable to find work in Vietnam. 1RP 190. After nearly three years, he returned to the United States, hoping to

¹ There are four physical volumes of Verbatim Report of Proceedings referenced as follows: 1RP – Oct. 6 and 11, 12, 13, 2011 (three consecutively paginated volumes); 2RP – Nov. 18, 2011.

find work and repay his employers. 1RP 190-91. However, he was arrested upon arrival at SeaTac Airport. 1RP 190.

From spring 2006 through January 2007, Nguyen worked as a home caregiver for Frances and Robert Griffin. 1RP 39, 42, 48, 51. Both were elderly, and Robert Griffin required care that his wife was unable to provide due to her own poor health. 1RP 37-38, 206-07. The Griffins' daughter testified the family had no complaints about Nguyen's work. 1RP 50. Shortly after Nguyen returned to Vietnam, Frances Griffin learned of several checks written on her account. 1RP 51. She filed an affidavit of fraud swearing that she did not write them and believed Nguyen was responsible. 1RP 148-49. The affidavit of fraud specifically referenced four of the five checks that were disputed at trial. Ex. 11. This affidavit of fraud was admitted at trial as exhibit 11. 1RP 150-52.

The Griffins' daughter Annette Fender testified that when her mother asked her to look into the problem, she immediately noticed two checks that did not look like her mother's handwriting, one dated January 3, 2007 for \$5,700 and a second dated January 10, 2007 for \$9,300. 1RP 54-56. She also testified three more checks were not in her mother's handwriting: one dated January 7, 2007 for \$500.41, one dated November 27, 2006 for \$4,000 and one dated December 11, 2006 for \$2,600. 1RP 56-58.

Nguyen denied forging the other three checks. 1RP 193. He testified the check for \$4,000 was a loan, and the check for \$2,600 included one week of his \$1,000 per week salary and \$1,600 to reimburse him for a computer and accessories that he purchased on a credit card for Frances Griffin to give her grandson for Christmas. 1RP 193-95. Fender confirmed her mother gave the grandson a computer that Christmas. 1RP 75-76. He could not recall what the \$500.41 check was for, but denied having written it. 1RP 227.

A bank fraud investigator testified the disputed checks cleared, meaning the bank paid on them from the Griffins' accounts. 1RP 96-98. The bank ultimately received a partial reimbursement of \$5,832.29 from Nguyen's bank on the \$9,300 check. 1RP 97.

A forensic scientist from the Washington State Patrol Crime Lab testified Frances Griffin "probably" did not write the five disputed checks. 1RP 116. His certainty did not rise to the level of "highly probable." 1RP 133-34. He also testified it would be impossible to identify the actual author because the author appeared to be trying to simulate someone else's writing. 1RP 117, 135.

In closing argument, the prosecutor argued there were four people who testified Frances Griffin did not write the checks. 1RP 280. The first person mentioned was Griffin and the affidavit of fraud:

First of all, Frances herself, obviously is not here. Frances is not in the courtroom to testify; however, she did fill out an affidavit of forgery, and this is the affidavit of forgery that she filled out with Kim Clanton, her banker, and as Kim Clanton said this affidavit of forgery does not get filled out unless the customer is absolutely positive that these checks have not been written or drawn by them with their permission. They being Robert and Frances Griffin. So in this case, Frances Griffin does get to speak and she does get to speak through this business record. You'll see her signature on the back, and again, with Kim Clanton's testimony, this is the very few words that Frances Griffin will at least be able to say in this courtroom that I did not do this. She also says in here that she believes Mr. Nguyen did it.

1RP 280-81. The prosecutor emphasized Frances Griffin's inability to come to court and her belief that Nguyen was guilty. 1RP 280-81.

C. ARGUMENT

1. NGUYEN'S TRIAL WAS RENDERED UNFAIR WHEN THE COURT ADMITTED THE EXHIBIT DECLARING FRANCES GRIFFIN BELIEVED HE WAS GUILTY.

The jury's fact-finding role is essential to the constitutional right to a jury trial. Sofie v. Fibreboard Corp., 112 Wn.2d 636, 656, 771 P.2d 711 (1989). That role is to be held "inviolable" under Washington's constitution. Const. art. I, §§ 21, 22. Therefore, "No witness, lay or expert, may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference." State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). Expressions of personal belief as to guilt are "clearly inappropriate" testimony in criminal trials. State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008). An explicit or nearly explicit opinion on credibility or guilt

is manifest constitutional error that may be raised for the first time on appeal. Montgomery, 163 Wn.2d at 595.

Nguyen's right to a fair trial was compromised by admission of exhibit 11. While Frances Griffin was unable to testify at trial, the court admitted her signed affidavit of fraud, in which she declared, "I believe that Doanh Nguyen is responsible for the fraud." Ex. 11. Admission of this explicit opinion on guilt, which invaded the province of the jury, was manifest constitutional error that violated his right to a fair trial.

a. The Affidavit of Fraud Was an Improper Opinion on Guilt.

To determine whether an opinion is improper, courts consider (1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact. State v. Johnson, 152 Wn. App. 924, 931, 219 P.3d 958 (2009) (citing State v. Hudson, 150 Wn. App. 646, 653, 208 P.3d 1236 (2009)).

Frances Griffin was a lay witness, rather than an expert or a law enforcement officer, but her statement was particularly problematic because she did not testify and could not be cross-examined regarding the basis for her opinion. Additionally, she was the only witness (other than Nguyen himself) who had direct personal knowledge of any of the events

surrounding the disputed checks. Because she was not an expert, the jury was not instructed it could reject her opinion.

The specific nature of the testimony was a direct expression of personal belief such as was decried in Montgomery. 163 Wn.2d at 594 (citing State v. Kirkman, 159 Wn.2d 918, 936-37, 155 P.3d 125 (2007) (use of phrases like “we believe,” indicates direct or explicit expression of personal belief). The affidavit of fraud was not a witness drawing reasonable inferences from her observations. See Montgomery, 163 Wn.2d at 591 (witnesses may offer opinions or inferences based upon rational perceptions that help the jury understand the witness’ testimony). It did not say she identified Nguyen’s handwriting, or that Nguyen had access to the checkbook. It simply declared she believed Nguyen was responsible for the fraudulent checks. Ex. 11. This was a direct opinion on guilt.

The nature of the charges and the defense also show this opinion was improper. The charges were fraud and theft, all hinging on one question: whether Nguyen wrote the three disputed checks. There was other evidence (such as the handwriting expert’s testimony) that Frances Griffin was not the author, but no witness could say whether Nguyen wrote the disputed checks in the face of his adamant denials. 1RP 131.

b. Admission of the Affidavit of Fraud Was Manifest Constitutional Error.

Although this issue is raised for the first time on appeal, this Court should reach the issue and reverse because this was manifest constitutional error. See Johnson, 152 Wn. App. at 934. Improper opinion testimony is constitutional error because it violates the right to trial by a fair and impartial jury. Id. The constitutional error is manifest when 1) the opinion is explicit or nearly explicit, and 2) it causes actual prejudice or has practical and identifiable consequences. Montgomery, 163 Wn.2d at 595; Kirkman, 159 Wn.2d at 936-37. Both criteria are met in this case. As discussed above, the statement in the exhibit “I believe Doanh Nguyen was responsible,” is a direct and explicit opinion on guilt. The opinion testimony in this caused identifiable prejudice because the prosecutor encouraged the jury to rely on it and the jury’s inquiry shows it likely did so.

Division Two of this Court reversed a conviction for child molestation in Johnson because of improper opinion testimony. Johnson, 152 Wn. App. at 927. That case involved out-of-court statements attributed to Johnson’s wife indicating she believed the victim’s allegations. Id. at 931. The victim, her mother, and her stepfather all related an incident in which Johnson’s wife confronted the victim, T.W., about the accusations and demanded she prove it was true. According to the witnesses, when T.W.

recounted details of Johnson's intimate anatomy and sexual habits, his wife burst into tears, acknowledged it must be true, and hours later attempted suicide by overdose. Id. at 932-33. The court reasoned this testimony "sheds little or no light on any witness's credibility or on evidence properly before the jury and really only tells us what [Johnson's wife] believed." Id. at 933.

The Johnson court held it was manifest constitutional error to admit Johnson's wife's opinion and reversed his conviction despite the lack of objection below. Id. at 933-34. The court noted, "[T]he jury should not have heard collateral testimony that Johnson's wife believed T.W.'s allegations." Id. at 934. The court reasoned that this testimony "served no purpose except to prejudice the jury," and Johnson was thereby denied a fair trial. Id. at 934.

The statement in the affidavit that Griffin believed Nguyen was responsible, like Johnson's wife's reaction, only tells us what she believed. As in Johnson, her belief sheds no light on witness credibility or any other question properly before the jury. Frances Griffin's affidavit served no purpose except to put impermissible opinion before the jury. While her relationship to Nguyen may not be as inherently prejudicial as Johnson's own wife believing the allegations against him, the prosecutor's closing

argument and the jury's inquiry demonstrate the jury was actually influenced.

When a jury inquiry indicates the jury was influenced by an improper opinion, manifest constitutional error may exist despite the presumption that the jury follows the court's instructions. Montgomery, 163 Wn.2d at 596. In Montgomery, the court found no manifest constitutional error in large part because the jury was properly instructed it was the sole arbiter of credibility and was not bound by expert opinion. Id. at 595-96. However, the court specifically pointed to a jury inquiry as the type of evidence that may demonstrate the practical and identifiable consequences that amount to manifest constitutional error. Id. at 596. In rejecting Montgomery's claim that the improper opinions in his case were manifest constitutional error, the court reasoned, "There was no written jury inquiry or other evidence that the jury was unfairly influenced." Id.

In Nguyen's trial, by contrast, the jury made a written inquiry that shows it was influenced by the affidavit. CP 148. During deliberations, the jury asked the court, "Can we have the Affidavit of Fraud for check #5511², Acct 1100370301? If not, is there a reason this was not completed by Francis?" CP 148. Although the jury was properly instructed that it is the

² The affidavit of fraud referred to four of the five checks. Ex. 11.

sole judge of credibility, it was also instructed specifically instructed to consider the exhibits:

- “[T]he evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses and the exhibits that I have admitted during the trial,” and
- “[Y]ou must consider all of the evidence that I have admitted.”

CP 26. The court admitted the affidavit of fraud. 1RP 150-51. Nothing in the instructions told the jury it could not consider the affidavit, or Frances Griffin’s opinion, as evidence of guilt.

The prosecutor’s closing argument also demonstrates the affidavit of fraud had the practical and identifiable consequence of influencing the jury’s decision. In closing argument, the prosecutor emphasized the affidavit and encouraged the jury to rely on it. She pointed out the affidavit was Frances’ Griffin’s only opportunity to speak to them and that “she believes that Mr. Nguyen did it.” 1RP 281.

“[I]f there were evidence that these improper opinions influenced the jury’s verdict, we would not hesitate to find actual prejudice and manifest constitutional error.” Montgomery, 163 Wn.2d. at 596 n.9. The hypothetical situation described in Montgomery was realized in this case.

The jury's inquiry and the prosecutor's closing argument are both evidence that the improper opinion influenced the verdict. With regards to the three checks he denied writing, Nguyen was actually prejudiced by the court's decision to admit the affidavit of fraud. Therefore, this Court should find manifest constitutional error and reverse. Id.

2. COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO THE AFFIDAVIT OF FRAUD.

Alternatively, if this Court concludes this issue was not preserved, Nguyen was denied his right to effective assistance of counsel. A conviction should be reversed for ineffective assistance of counsel when counsel's performance was deficient and there is a reasonable probability the error affected the outcome. Strickland v. Washington, 466 U.S. 668, 685-87, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

The failure to object to this clearly improper and highly prejudicial opinion on guilt was unreasonably deficient. Legitimate trial strategy or tactics may constitute reasonable performance. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). But there is no possible strategic reason for permitting improper opinion evidence showing Frances Griffin believed Nguyen was guilty.

The outcome would likely have been different, had counsel objected. First, a motion to exclude this improper opinion would likely have been granted under Montgomery and Johnson, discussed above. The prosecutor apparently believed the affidavit of fraud was admissible under the business records exception to the hearsay rules. 1RP 280. But that exception only resolves objections based on hearsay. State v. Thamert, 45 Wn. App. 143, 149-51, 723 P.2d 1204 (1986). Merely because testimony does not violate hearsay rules does not mean it meets other requirements for admissibility. Id. For example, in Thamert, part of the defendant's confession, found admissible after a CrR 3.5 hearing, was not properly admitted under ER 404 (b) because it referenced a prior conviction. Thamert, 45 Wn. App. at 149-51. Like prior bad acts, third party opinions on guilt are inadmissible even if they do not violate other restrictions on evidence. Montgomery, 163, Wn.2d at 591; Johnson, 152 Wn. App. at 931-34. Had counsel objected to the improper opinion, the court would likely have excluded it. Without that opinion, the jury would have been far more likely to credit Nguyen's adamant denials regarding three of the five checks.

The prejudice prong of the analysis is satisfied when there is a reasonable probability the outcome would have been different but for the attorney's deficient performance, i.e., "a probability sufficient to undermine confidence in the reliability of the outcome." Strickland, 466 U.S. at 694;

Thomas, 109 Wn.2d at 226. The jury's inquiry shows it was influenced by Frances Griffin's opinion on guilt contained in the affidavit of fraud and undermines confidence in the outcome here. Nguyen's convictions should be reversed on the alternative grounds that ineffective assistance of counsel denied him a fair trial.

D. CONCLUSION

Three of Nguyen's five convictions should be reversed because improper opinion evidence was admitted in violation of his constitutional right to a jury trial.

DATED this 26th day of June, 2012.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC


JENNIFER J. SWEIGERT

WSBA No. 38068

Office ID No. 91051

Attorney for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 42901-2-II
)	
DOANH NGUYEN,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 26TH DAY OF JUNE 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DOANH NGUYEN
DOC NO. 354044
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 26TH DAY OF JUNE 2012.

x Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

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